

Answer

EMBAJADA DEL PERU
WASHINGTON, D. C. 20036DEPT. OF TRANSPORTATION
DOCKET SECTION

Note No. 5-3-M/ 137

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The Embassy of Peru presents its **compliments** to the Department of State **and** has the honor to refer to the complaint filed with the Department of Transportation by Fine Airlines, Inc. ("Fine Airlines") **against** the **Government** of Peru in Docket OST-95-69 1.

The Government of **Peru** requests that the Government of **the** United States of America dismiss the Fine Airlines complaint which seeks sanctions against Peru for excluding Fine Airlines from operating in Peru. It is **a fundamental** right of **any** state to defend itself against aggression **and** those who **aid** and abet aggressors. The Government of Peru has **determined** that Fine Airlines transported arms to Ecuador while Ecuador was engaged in hostilities with Peru. As **a** direct result of this determination, **Peru's** Ministry of Transportation, Communication, Housing and **Construction** adopted Ministerial **Resolution No. 100-95-MTC/ 15.12**, excluding Fine Airlines from **operating** in Peru. This act **was a** sovereign, **reasonable**, appropriate and nondiscriminatory act **of** the **Government** of Peru **which is entitled** to the **support** of the United States.

Under the 1942 **Peruvian-Ecuadorian Protocol of** Peace, Friendship and Boundaries, **the United States of America** is guarantor of the peace **between** the two **countries**. In **a Press** Communique. issued in Brasilia on February 10, 1995, just a week before the first Fine Airlines arms shipment, the four guarantor countries of the Protocol urged the international community to **join them** in their commitment to refrain from providing weapons and **military material** to Ecuador and Peru. In the view of the Peruvian Government, if the Government of the United **States** of America **were** to accept the **Fine Airlines** complaint, it would be **acting** in a **manner wholly inconsistent** with its obligations under the Protocol and the commitment made in the Brasilia Communique.

The Peruvian decision to **exclude** Fine Airlines from operating in **Peru** was taken for national security reasons **and is** entirely unrelated to the competition for air transport services between the

OPTIONAL FORM 98 (7-90)

FAX TRANSMITTAL		# of pages 8
To	From	
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366-3694	647-8528	
NSN 7540-01-317-7368		5099-101
GENERAL SERVICES ADMINISTRATION		

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United States and Peru. **The Government of Peru affirmed its** commitment to the principle of vigorous competition in the recent bilateral agreement reached **between** our two countries and the **extra-**bilateral rights granted U.S. airlines. The good relations between our countries should not be threatened or **damaged** by the wrongful acts of a single **irresponsible** air carrier.

1. **Evidence of Arms Shipments.**

Cargo manifests **and** waybills provided by the Government of Argentina show that on **February** 17, 18, and 22, 1995, an aircraft owned and **operated** by Fine Airlines took off from Buenos Aires carrying **material identified as** "material **belico secreto**," **i.e.**, "secret war materials." The air waybills identified the consignor **as Direccion** General de Fabricaciones **Militares** which organizes Argentina's arms **industry** and produces **arms** and munitions. The Government of Peru has determined that the cargo on these **flights** consisted of 8,000 FAL rifles, 18 105mm canons, 18 355mm canons, 10,000 9mm pistols, 350 mortars, 50 heavy machine guns, **58,000,000 ammunition** units, 45,000 canon projectiles, 9,000 grenades, and 200 **tons of** explosives. The **aircraft** landed on two occasions in Gussyquil, Ecuador and once in Quito, Ecuador, **and** off-loaded arms and munitions.

Fine **Airlines** has **confirmed** that **its** aircraft made three flights and has never denied that the cargo was arms **and** munitions. In these circumstances, the **Government** of Peru's decision to **sanction** Fine Airlines was **fully** justified.

Fine Airlines contends that it did not know that its aircraft was **transporting arms** and ammunition. This denial **is contrary** to the evidence gathered by the Government **of Peru**.

Both **the** air waybills and cargo manifests clearly identify for **the** company **and its crew** that **the cargo was** "material **belico secreto**," **i.e.**, "secret war material," and the consignor **was the** Directorate of Military Factories.

When **interviewed by Peruvian investigators, Frank and Barry** Fine claimed that their aircraft was chartered by a previously

unknown third party, and on three occasions, the Fine Airlines crew accepted manifests and waybills wrapped in plastic, flew the aircraft into a known war zone via a circuitous route, and off-loaded packages wrapped in heavy plastic. This story is consistent with the conclusion that Fine Airlines knew or was intentionally avoiding actual knowledge of arms shipments. The story also has been proven materially false by Peruvian investigators.

The Fines have stated to the Peruvian Government that a company named Airline Equipment Specialists, located in Houston, Texas, chartered the aircraft and did not inform the Fines of the content of the cargo. The Fines named Tank Allen as the manager of Airline Equipment Specialists. According to the public records of the State of Texas, Airline Equipment Specialists does not exist. There is no record of any corporation, partnership, or other entity "doing business as" Airline Equipment Specialists in Texas state records. There also is no telephone listing for either Airline Equipment Specialists or Tank Allen in the Houston area. The copy of the supposed charter contract produced to the Government of Peru by Fine Airlines is not signed by Airline Equipment Specialists or Mr. Allen, nor are the alleged cargo warrants and indemnification. Indeed, "Tank Allen" is listed as the Fine Airlines "Captain" on the Ecuador landing permit for at least one flight, as well as on the overflight permits for Brazil and Paraguay. However, Tank Allen does not appear as a declared member of Fine Airlines crews.

Accepting cargo manifest and waybills wrapped in plastic, even if true, is so contrary to international air transport requirements and safety practices that it supports the conclusion that the Fines knowingly acted in an illicit manner.

Under the Chicago Convention on International Aviation, December 7, 1944, every aircraft that carries cargo must carry a manifest and detailed declarations of the cargo. (Chapter V, Art. 29). Federal Aviation Administration regulations require the holder of the operating certificate to prepare an accurate cargo manifest for each flight. Peruvian law similarly requires a cargo manifest to be prepared by the shipper and given to the transporter, and places the burden on

the transporter to **verify** that *no* hazardous cargo is loaded onto the **aircraft**. Moreover, a former **Fine Airlines pilot** confirmed that **Fine Airlines pilot**8 are expected to know the contents of their cargo and that their regular practice is to know the **type** of cargo they are **carrying**.

These regulations codify **fundamental** flight safety requirements. The pilot must consult the cargo manifest to ensure that his cargo has been properly loaded and distributed to obtain the correct weight and balance for a safe flight. No experienced pilot would take off without knowing the **nature** and weight of his cargo, especially if there were any possibility that it could explode.

Fine Airline8 **also** appears to have been Operating secretly in Argentina, further suggesting that the company **was** aware it **was** transporting arms. The Oovernment of Argentina ha8 stated that Fine Airlines did not have permits to operate in Argentina or **transport** cargo from Argentina to Ecuador for the dates in February 1995, when the flights **transporting** the arms landed and departed from **Buenos Aires**.

Fine Airlines' protest8 of innocence are further undermined by the statement of former Fine **Airlines pilot** Luis **Michaels**. Mr. Michaels told **Peruvian** investigators that he **was** approached by Fine Airlines' Chief of Scheduling to pilot **the** flights that carried the arms to Ecuador. Mr. Michael8 stated that, based on his **fifteen years** of experience as a **cargo** pilot, **his** knowledge that there is **virtually** no commercial traffic on the proposed route, the circumstances **surrounding** the **flights**, and the way in which he **was** approached, it **was** **clear** to him that the **flights** would be transporting **arms** to **Ecuador**. Mr. Michaels declined to **make** the flights. He was then approached by the Director of Operations whom Mr. Michaels told that he **would** not fly the routes because arms were being transported. The Director of Operation8 did not dispute the nature of the flights. Instead, he responded that Mr. **Michaels** should do the **flights anyway** because the war **was** over and Frank Fine **wanted** Mr. Michael8 to personally do **the** flights.

The route charted for **the** Fine **flights** is additional **evidence** that Fine Airlines knew that it **was** transporting arms. When

applying for overflight permits, Fine Airlines identified the route as Buenos Aires--Caracas--Guayaquil. According to those overflight permits, the flights carrying the weapons, in fact, flew northeast over Paraguay, Bolivia, and Brazil, as if they were headed for Caracas, and then turned west and flew without proper authorization over Colombia, then turned south to reach Ecuador.

Now, Fine Airlines claims, contrary to the overflight permit applications, the intended route was Buenos Aires--Guayaquil--Caracas. But, if the intended destination were, in fact, Ecuador, there was no innocent reason to fly northeast to Caracas to refuel prior to returning south to Buenos Aires. The only possible explanation for the false permit requests and the roundabout route can be a conscious decision to cover up Fines' true intent.

The Government of Peru understands that the United States Federal Aviation Administration has determined that Fine Airlines has not "violated regulations governing the transportation of hazardous materials by air." Although Fine Airlines has claimed that the FAA letter completely exonerated it from any wrongdoing, the letter fails to state that Fine Airlines did not transport arms to Ecuador, nor did it state that Fine Airlines was unaware of the nature of the flights in question. The letter merely concluded that the hazardous materials regulations, which govern the packaging and labeling of hazardous materials, were not violated.

The FAA's conclusion, in fact, appears to support the conclusion of the Government of Peru. The hazardous materials regulations, which apply to at least some of the munitions on the Fine Airlines flights, require, among other things, that the pilot be notified of the nature of the material that he is carrying and that the materials be properly packaged and labeled. Since the Federal Aviation Administration concluded that there was no evidence of a violation of the regulations, a reasonable conclusion is that Fine Airlines transported the arms to Ecuador with full knowledge of what it was doing.

The Government of Peru would be justified in excluding Fine Airlines if it were so careless as to allow its aircraft to be

used for **arms** shipment to an opposing combatant during hostilities or intentionally blinded itself to the truth. The evidence, however, demonstrates that Fine Airlines acted knowingly and intentionally.

If the **Government** of the United States of **America** chooses to pursue the **Fine** Airlines complaint further, the Government of the **United States** of America should conduct an investigation in which Frank and Barry **Fine** and **other** U.S. persons with knowledge of the relevant facts provide sworn testimony.

2. **Fine Airlines Misuse of IATF CPA.**

Peru's **Ministerial** Resolution **excluding** Fine Airlines from conducting air transportation to or from Peru was solely **a result** of *Fine Airlines* having illicitly transported weapons to Ecuador while Ecuador and Peru **were engaged in** hostilities; it was not **discriminatory** and had no competitive impact. It was not, as **Fine** Airlines suggests, the result of communications from Peruvian carriers seeking to exclude Fine Airlines from the **market**.

The Government of **Peru** understands that the **IATF CPA** was implemented to prevent other nations from **exercising their** sovereign power to **discriminate** against United States air carriers in favor of that nation's carriers. In this situation, **Peru's** action against Fine Airlines **was** not discriminatory against **United States carriers**, in general, and it did not **result** in any competitive **gain** to **Peru's** air carriers.

Fine Airlines **never** has **been** licensed or designated by the United States or Peru to operate any **services** to **Peru** within the scope of the United States-Peru Air Transport **Services** Agreement of 1986, as amended. **The** sole method by which a Fine Airlines aircraft served the United States of America-Peru **market** was through a "wet lease" with the Peruvian carrier Export Air **del Peru**. Prior to exclusion of **Fine** Airlines from operating in Peru, Export Air, **using he Airlines** equipment and crews that had been leased, conducted twice-a-week cargo runs between Miami and Lima. **Except for** a brief hiatus during the investigation, Export **Air** has continued to provide twice-a-week cargo service between Miami **and** Lima using equipment and **crews** that

have been wet-leased **from** a United States carrier. The only **change** was that Export Air has chosen to lease aircraft and crews from Air **Transport** International, another United States carrier, rather than Fine Airlines. **Indeed**, the Department of Transportation recently approved the Export-AT1 wet-lease arrangement for one year. As a result, the Government of Peru's exclusion of Fine Airlines has had no effect on the balance of competition between United States and Peruvian **carriers** in the United States-Peru air cargo market.

Fine Airlines' claim that Peru has violated **the** bilateral agreement is incorrect. Fine Airlines refers to its license from the Department of Transportation to conduct "**worldwide**" charter services. However, the United States of America-Peru bilateral agreement contains no provision for charters. **Fine** Airlines also contends that it had been **authorized** to conduct "**wet lease**" operations **on** behalf of Export Air **del** Peru, a Peruvian air **carrier**. Such authority, however, **also** is not provided for in the **bilateral agreement**. The **Government of** Peru granted to Export Air a license to operate its cargo service. After **discovery** of Fine Airlines' wrongdoing, Export Air decided to change leasing **companies**. The Government of Peru did not terminate any existing rights which Fine Airlines had under the bilateral agreement or otherwise.

The Government of Peru has discovered that the air cargo companies that wrote the letters attached to Fine **Airlines'** complaint do not support that complaint. These companies **also** have **confirmed in** follow-up letters that **they** do not support Fine Airlines' **complaint** against Peru. The Government **of** Peru **also** has determined that **Fine** Airlines appears to have obtained the letters under false pretenses.

The non-discriminatory nature of Peru's action against Fine Airlines also is supported by Fine Airlines' blemished record in the United States, where the Department of Transportation and the Federal Aviation Administration themselves have, in the recent past, taken action against Fine Airlines and its principals. For example, when the Department of Transportation awarded Fine Airlines, Inc. a Certificate of Public Convenience and **Necessity**, it **took** the extraordinary **step of**

limiting the duration of the **Certificate** to one year because the Fines' history of noncompliance with FAA and DOT regulations created "reservations regarding the commitment of Fine Airlines and its principals to comply with all applicable rules and laws." See Application of Fine Airlines', Inc., Order **92-10-22**. The **DOT's** concerns were validated last year, when seventy percent of Fine Airlines fleet was grounded by the FAA for **failing** to comply with the first **statutorily-**mandated compliance date for the transition to an all-Stage 3 fleet under FAA aircraft noise **regulations**.

The Government of Peru continues to honor fully its undertakings pursuant to the United States-Peru bilateral agreement, and to grant extra-bilateral privileges to United States carriers generally, as it has done in the past. Since the actions by the Government of Peru with respect to Fine **Airlines**, as detailed above, were fully in accord with principles of international law as well as the national laws and regulations of Peru, they fail to provide any legitimate basis for the complaint tiled by Fine Airlines. The Government of **Peru** looks forward to the continued development of air services between our two countries in line with the principles reflected in the amendments to the **Air Transport Services** Agreement which entered into force July 3, 1995, and requests that the United **States** dismiss with prejudice forthwith the complaint of Fine Airlines such that the benefits of this new agreement can be realized to the advantage of the passengers, shippers, carriers, and national economies of **both** countries.

The Government of the United States is authorized to disclose this Note on the public record of its Department of **Transportation**.

The Embassy of Peru avails itself of this opportunity to renew to the Department of State the **assurances** of its highest consideration.

Washington DC., October **31st**, 1995.



To the Honorable Department of **State**
Washington D.C.